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PP

v.

ABDUL KARIM PAK KUB & ANOR (NO 2)

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HIGH COURT MALAYA, TAIPING
ABDUL MALIK ISHAK J
[CRIMINAL TRIAL NO: 58-15-92]
24 SEPTEMBER 1994

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CRIMINAL LAW: *Dangerous Drugs Act 1952 (Malaysia) - Section 39B(1)(a) - Offence of trafficking in dangerous drugs - Whether accused was found in possession of dangerous drugs - Dangerous Drugs Act 1952, s. 37(da)*

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EVIDENCE: *Burden of proof - Presumption - Rebutting presumption of trafficking - Whether defence of mere denial sufficient - Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a)*

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The accused persons were jointly charged for the offence of drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the close of the prosecution's case, the trial judge had acquitted the accused persons. The prosecution appealed and the Supreme Court ordered for the defence to be called. According to the facts, packages containing drugs were found in the boot of the car wherein the first accused was a passenger.

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The first accused's version was that he was in Thailand on 17 May 1992 when one Omar visited him to purchase some cloth. On 24 May 1992, the first accused had visited Omar to collect payment from him when Omar introduced him to two persons named Aziz and Solar. Apparently Omar had asked the first accused to visit him the next day to collect the balance payment. The first accused was on his way when he met Aziz and another person named Bob. Aziz and Bob said that they were going to visit Omar and asked the first accused to go along with them. Bob drove the car and after 15 minutes into the journey when the car had stopped and Bob asked Aziz and the first accused to go to the rear portion of the car.

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Whilst the first accused was at the rear portion of the car, Bob alighted, opened the boot of the car and placed the first accused under arrest. This was followed by the arrival of another car wherein the passengers of that car shouted "Police". The first accused then saw Bob showing to the police personnel the articles in the boot of the car. The first accused was then

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taken to the police station where he admitted signing the search list but insisted that he did not understand Bahasa Malaysia and that he did not have the services of a translator.

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The second accused adopted the same line of defence in that he alleged that the drugs found in the car number ABT 9753, a police vehicle, were purposely planted there to entrap and link them to an offence of drug trafficking.

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Held:

[1] In introducing the character by the name of Omar, the defence sought meekly to lay the foundation that it was Omar who was the principal actor in the whole episode. Both the accused persons in their defence did not specifically mention the nefarious activities of Omar but instead adverted to the purchase of textile materials and the debts accruing to the first accused. Omar was therefore a fictitious character coined up by the defence to mislead the court.

*c**d*

[2] It was also the defence's contention that both accused persons could not communicate in Bahasa Malaysia as they were Thai nationals. However under cross examination, both the accused persons displayed an understanding of Bahasa Malaysia as they replied, at times, before the questions were translated by the court interpreter. Moreover if the accused persons could not communicate in Bahasa Malaysia, they would not have been able to communicate with the taxi driver in order to go to Omar's house as alleged by them.

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[3] The defence of mere denial is insufficient to rebut the statutory presumptions under s. 37(d) and 37(da) of the DDA on a balance of probabilities.

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[Both the accused persons found guilty and sentenced to death.]

Case(s) referred to:

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Chua Beow Huat v. PP [1970] 2 MLJ 29 (refd)

Lee Yoon Choy & Ors v. PP [1948-49] MLJ Supp 167 (refd)

Mahbub Shah v. Emperor [1945] AIR PC 118 (refd)

PP v. Salleh Saad [1983] 2 MLJ 164 (refd)

R v. Pichimuthu [1970] 2 MLJ 143 (refd)

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R v. Vilayutham [1953] 1 MLJ 277 (refd)

Wong Swee Chin v. PP [1981] 1 MLJ 212 (refd)

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(d), (da), (iv), 39B(1)(a), (2)

Penal Code, s. 34

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- a* For the prosecution - Murtazadi Amran DPP
For both the accused persons - Jula Singh; M/s Paramjit & Co
Reported by Mariette Peters-Goh

JUDGMENT

- b* **Abdul Malik Ishak J:**

As ordered by the Supreme Court, I heard the defence of both the accused persons who were charged for jointly trafficking in dangerous drugs, to wit, cannabis weighing 3,503 grammes at about 3.20pm on 25 May 1992 at Batu 108, Air Krai Kerunai, Gerik, Perak, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) ('Act') and punishable under s. 39B(2) of the same Act read with s. 34 of the Penal Code.

d In his defence, the first accused testified that he was educated up to standard four level and worked as a textile salesman before his arrest. On 17 May 1992 a Malay by the name of Omar visited him at Yala, Thailand and purchased 10 dozens of kain sarongs at RM1,200. Omar made an initial payment of RM600 and the first accused was supposed to collect the balance, in a week's time, at Omar's house. That night Omar slept at the first accused's house.

e The first accused testified further that on 24 May 1992 he went to Malaysia to visit Omar at Kampong Lallang and there he was introduced to two persons by the names of Solar and Aziz. The first accused testified that he heard but could not understand the conversations between Omar, Solar and Aziz. The first accused denied agreeing to sell 5 kilogrammes of ganja to the three of them at RM1,200. A short while thereafter both Solar and Aziz left Omar's house. The first accused also denied accompanying Solar and Aziz to the Pengkalan Hulu bridge. In regard to the balance of RM600, Omar requested the first accused to return the next day to collect it. The first accused also denied that on 24 May 1992 he promised to sell ganja to Solar and Aziz.

In regard to the incident on 25 May 1992, this was what the first accused said. He denied agreeing to meet Solar and Aziz at the Pengkalan Hulu taxi stand. He stated that on that date (25 May 1992) at 2.45pm he entered Malaysia in order to meet Omar at the Pengkalan Hulu taxi stand and while he was there he met Aziz and Bob who invited him for a drink at the coffee shop. The first accused testified that in the coffee shop he told Aziz, upon being asked, that he wanted to meet Omar. Aziz too replied that he (Aziz) also wanted to meet Omar. Soon thereafter Aziz invited the first accused to proceed in Aziz's car to go and meet Omar. The first

accused agreed and the car bearing registration number ABT 9753 was driven by Bob. The journey took 15 minutes and as the car stopped, Aziz alighted and went straight to the rear of the car. Bob told the first accused that they had planned to meet Omar there. Soon thereafter Aziz entered the car and told Bob that Omar was not there. This prompted Bob to make a U-turn and, as soon as this was effected, Bob asked Aziz and the first accused to go to the rear portion of the car. Whilst the first accused was at the rear portion of the car, Bob alighted from the car, opened the boot of the car and placed the first accused under arrest. This was followed by the arrival of another car and the occupants of that car shouted "POLICE" and they also placed the first accused under arrest. The first accused also saw Bob showing to the police personnel the articles in the boot of the car. The first accused was then taken to Grik police station.

The first accused testified that he did not know the contents of both packages in the boot of the car driven by Bob. The first accused admitted signing the search list (P27) but alleged that no caution was administered to him. At Grik police station there was no Thai interpreter to explain his predicament. Finally, the first accused testified that he was telling the truth in this court.

The second accused also testified under oath. He stated that he had an education up to primary two in a Thai school. That on 23 May 1992 the first accused invited him to visit Malaysia to meet Omar in order to collect the balance of his debt to the tune of RM600.

The second accused testified that on 24 May 1992 at 2pm he took a taxi to the border and as he arrived at Pengkalan Hulu he changed his taxi to go to Omar's house. At Omar's house, the second accused testified and his testimony corroborated that of the first accused to the effect that there were Solar and Aziz there and that the second accused heard the three of them discussing but he did not know the subject matter of their discussions.

The second accused denied making a promise to sell 5 kilogrammes of ganja at RM1,200 to Omar and Solar. When Omar and Solar left the house after discussions, the second accused did not follow them to the Pengkalan Hulu bridge for further discussions in regard to the sale of drugs. The visit to Omar's house did not yield RM600 that was due to the first accused and, consequently, both the first and the second accused decided to return to Thailand.

The second accused denied that at any time on 24 May 1992 he promised to sell ganja to Omar and Solar. And the second accused also denied making a promise to meet Aziz at the taxi stand.

- a* In regard to the episode on 25 May 1992, this was what the second accused said. That he entered Malaysia till Pengkalan Hulu on 25 May 1992 at 2.45pm and whilst at Pengkalan Hulu he met Aziz and Bob. Aziz invited him for a drink and while he was drinking tea, he told Aziz that he wanted to meet Omar. Aziz also told him (the second accused) that
- b* he too wanted to meet Omar. Aziz then invited the second accused to accompany him in his (Aziz's) car to meet Omar.

- As the second accused boarded car number ABT 9753 he did not check the boot of the said car. The car travelled for about 15 minutes and it stopped. Aziz got down from the car and proceeded to the rear of the car. In doing so, Aziz told the second accused that Omar was there. Within a short span of time, Aziz returned to the car and said that Omar was not there. Bob, who drove the car, then made a U-turn and then stopped the car by the side of the road. Bob alighted from the car and went to the rear portion of the car. Bob also requested the second accused to alight from the car and as soon as the second accused complied, Bob said "POLICE" and arrested the second accused. This was followed by the arrival of other police personnel. Bob then showed the articles in the boot of the car but the second accused did not know the contents of those articles.

- e* The second accused further testified that at Grik police station he was made to sign the search list even though the caution was not read to him. He further categorically stated that he was not involved in the trafficking of drugs.

- f* It is obvious that both the accused persons adopted the same line of defence. It seems that they alleged that the drugs found in car number ABT 9753, a police vehicle, were purposely planted there to entrap and link them to an offence of drug trafficking. Indeed that was a wild allegation totally devoid of merit. Why should the police place 3,503
- g* grammes of cannabis in separate packages, tightly wrapped as can be seen in p. 168 photograph 'A' of the appeal record, in the boot of the car belonging to the police and then frame up both the accused persons for trafficking in them? No attempts were made to put to Aziz and Bob (witness known as Busra) (see the judgment of this court reported in (1994)
- h* MMD January issue at para. 41) that they bore grudges and were bent on framing up both the accused persons; without cross examinations in these directions the wild allegations as stated above could easily be labelled as mere afterthoughts and totally worthless.

- The evidence unfolded at the prosecution level showed the active roles
- i* played by both the accused persons, viz:

- (1) the discussions between Aziz and both the accused persons on 24 May 1992 at Pengkalan Hulu in regard to the supply of drugs where both the accused persons agreed that the price of 1 kilogramme of cannabis was at RM1,200 and that both the accused persons agreed to supply 5 kilogrammes of cannabis on 25 May 1992 at noon and further that the parties agreed to meet at the Pengkalan Hulu taxi stand. **a**
- (2) the discussions at Hotel Highland on 25 May 1992 at about 2.20pm between Aziz, Busra (Bob) and both the accused persons were focussed mainly on the availability of the drugs, its amount and its location which culminated in the journey to Batu 108, Air Krai, Kerunai where on the directions of the first accused, the second accused handed a package to Busra and the latter placed that package in the boot of car number ABT 9753 (see the package on p. 168 of the appeal record at photograph 'A' on the right side). Aziz testified that the second accused had told him that that package contained ganja. The second accused then revealed that there was another package of ganja. It was at this juncture that the first accused asked the second accused to fetch that second package. The second accused, on his own accord, was seen walking in the direction of Pengkalan Hulu and crossing the road towards the bushes to the left. Busra, Aziz and the first accused then entered the same car and Busra drove the car and made a U-turn and proceeded in the direction of Pengkalan Hulu towards the second accused, who by this time, was waiting by the road side with a package in his hands (see the package on p. 168 of the appeal record at photograph 'A' on the left side). Busra parked the car, got down and received the second package from the second accused whereupon Busra then placed the second package in the boot of the car. **b**
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The brief recital of the salient facts would conclusively point to the bond of common intention between both the accused persons as envisaged in *Mahbub Shah v. Emperor* [1945] AIR Privy Council 118 and as adopted in *Lee Yoon Choy & Ors v. Public Prosecutor* [1948-49] MLJ Supp 167. **g**

Faced with the formidable evidence, both the accused persons merely put up the defence of denial (*Public Prosecutor v. Salleh bin Saad* [1983] 2 MLJ 164). **h**

In introducing the character by the name of Omar through cross examination of Aziz, the defence sought meekly to lay the foundation that it was Omar that sold the drugs to Aziz and that Omar was the principal actor in the whole episode. But Aziz denied these allegations vehemently. Suprisingly, **i**

- a* both the accused in their defence did not specifically say about the nefarious activity of Omar but instead adverted to the purchase of textile materials and the debts accruing to the first accused. In my judgment, Omar was a fictitious character coined up by the defence to mislead the court for two reasons:
- b* (1) Both Aziz and Bob (Busra) were not cross examined that they agreed or had an appointment with Omar at the coffee shop, and suffice for me to say that the failure to put the defence case was fatal (*R v. Vilayutham* [1953] 1 MLJ 277, *Chua Beow Huat v. PP* [1970] 2 MLJ 29, *R v. Pichimuthu* [1970] 2 MLJ 143 and *Wong Swee Chin v. PP* [1981] 1 MLJ 212);
- c* (2) Both the accused persons, in their sworn evidence, did not explain nor touch on the role of Omar as the person who was responsible for selling the drugs to Aziz.
- d* It was also part and parcel of the defence case that both the accused persons could not communicate in Bahasa Malaysia as they are Thai nationals. Under cross examinations, both the accused persons displayed an uncanny understanding of Bahasa Malaysia as they replied, at times, before the questions were translated by the Thai court interpreter. The
- e* prosecution witnesses were not cross examined to establish that both the accused persons could not understand nor communicate in Bahasa Malaysia and, consequently, this point can simply be dismissed as mere afterthoughts. If both the accused persons could not communicate in Bahasa Malaysia, a pertinent question arises: How could they communicate with the taxi driver
- f* in order to go to Omar's house as alleged by them?
- In my judgment, on the totality of the evidence, both the accused persons knew that the two packages contained cannabis and, by virtue of its weight, they are deemed to be trafficking in the said drugs. In the face of formidable evidence, the defence of mere denial cannot rebut the statutory presumptions under ss. 37(d) and 37(da)(vi) of the Act on the balance of probabilities. The prosecution had proved its case beyond reasonable doubt and, accordingly, I found both the accused persons guilty of the offence for which they were charged and convicted them. I sentenced them to death.
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